SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No.

CHENG FU SHENG and LIN FU MEI,
Petitioners,

v.

WILLIAM P. ROGERS, Attorney General of the United States.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the judgment of the United States District Court for the District of Columbia, which held that petitioners may not be deported to Formosa.

Opinions Below

The opinion of the Court of Appeals has not yet been reported and is set forth in the Appendix, *infra*. The opinion of the District Court (R. 11-18) is reported at 177 F. Supp. 281, and is set forth in the Appendix, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on June 10, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether a warrant of deportation may be executed to deport an alien to "Formosa" where the statute [8 U.S.C. 1253(a)] expressly provides that deportation be effected to a "country."

2. Whether the determination of the Court of Appeals that Formosa is a "country" because it is a "political entity" with a government "in undisputed control of the island," is not an intrusion upon the conduct of foreign relations by the Executive where the Department of State has never recognized Formosa itself as a "political entity" and has deliberately eschewed recognition of the transfer of Formosa to the Republic of China, which presumably is the government in "undisputed control of the island."

3. Whether the term "country" in a deportation statute is to be given the narrowest of several possible meanings or whether it is to be given a construction broad enough to permit deportation of aliens to areas which are not countries.

4. Whether the petitioners may be deported under warrants of deportation which fail to specify the place of deportation in the face of administrative regulations which require the district director of the Immigration and Naturalization Service to designate the country to which an alien shall be deported.

Statutes and Regulations Involved

Section 243(a) and (b) of the Immigration and Nationality Act, 66 Stat. 212, 213, 8 U.S.C. 1253(a) and (b), provide:

> *Countries to which aliens shall be deported—(a) Acceptance by designated country; deportation upon non-acceptance by country.*
>
> The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national or, had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of

original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war.

If the United States is at war and the deportation, in accordance with the provisions of subsection (a) of this section, of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient, or impossible because of enemy occupation of the coun-

try from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

8 Code of Federal Regulations provides under Part 243 as follows:

Part 243—Deportation of Aliens in the United States § 243.1 Issuance of warrants of deportation, country to which alien shall be deported; cost of detention; care and attention of alien—(a) Issuance. A warrant of deportation shall be based upon the final order of deportation and shall be issued by a district director or an immigration officer acting for him.

(b) Determination of place and cost of deportation, and necessity for attendants. District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

§ 243.2 Finality of decision. No appeal shall lie from the decision of the district director in the exercise of the authority described in § 243.1.

§ 243.3 Execution of warrants of deportation—(a) Taking alien into custody. Upon the issuance of a warrant of deportation or as soon thereafter as the circumstances of the case require, the alien, if not in the physical custody of the Service, shall be taken into custody under the authority of such warrant of deportation and deported.

Statement

Petitioners are natives and citizens of China who entered the United States [1] as nonimmigrants to receive military training with the United States Air Force. They completed their studies but failed to depart from this country. Deportation proceedings were thereupon brought against them and eventuated in warrants directing their deportation. (R. 4, 6)

On September 17, 1959, petitioners filed an action in the United States District Court for the District of Columbia in which they alleged that the Attorney General had ordered them deported to Formosa. They complained that the warrants directing them to be deported to Formosa were void and contrary to law in that Formosa is not a country within the meaning of Section 243(a) of the Immigration and Nationality Act [66 Stat. 213, 8 U.S.C. 1253(a)], to which they may be deported. (R. 4, 6)

The case was heard by the District Court on cross motions for summary judgment filed by petitioners and the Attorney General. In support of his motion, the Attorney General lodged with the Court the administrative proceedings, including the warrants of deportation, relating to each

[1] Petitioner, Cheng Fu Sheng, entered June 9, 1952, and petitioner, Lin Fu Mei entered on February 12, 1953. (R. 4, 6)

of the petitioners. The warrants failed to specify the country to which the petitioners were to be deported, but directed their deportation merely "pursuant to law." (R. 11) A stipulation was thereupon filed stating that the Attorney General's purpose is to effect petitioners' deportation to Formosa and that this fact had been communicated to them, that the "Government of the Republic of China has agreed to accept (petitioners) into its territory," but that no treaty or any other agreement "has purported to transfer the sovereignty of Formosa to China." (R. 9)

Petitioners also challenged the validity of the warrants of deportation upon the additional ground that the place of deportation is not specified in the warrants.

The District Court granted summary judgment for the petitioners upon the ground that deportation to Formosa could not be sustained under the statute. The Court held that Section 243(a) of the Immigration and Nationality Act permitted deportation only to a country, in the present instance, to China. Deportation to Formosa, the Court ruled, could be allowed only if Formosa is part of China. (177 F. Supp. 281, 282) As to that issue, the Court declared it was bound by the official attitude of the Department of State that Formosa is not part of China as a country (at 284).

On June 10, 1960, the Court of Appeals reversed the judgment of the District Court and ordered the case remanded with directions to grant summary judgment for the Attorney General.

In its opinion, the Court of Appeals stated its view that Formosa is a "country" within the meaning of the statute because it is a "well-defined geographical, social, and political entity" and because "there is a government on Formosa which has undisputed control of the island." It concluded that inasmuch as its construction of the term

"country" is not limited to "national sovereignties * * *, the possibilities of foreign embarrassment which the District Court feared do not arise." Nor does its construction, the Court of Appeals stated, involve judicial intervention into political matters entrusted to the Executive and Legislative Branches.

Although petitioners urged the Court of Appeals to sustain the decision of the District Court upon the alternative ground that the warrants of deportation are void for failure to state the place of deportation, the Court did not reach that issue.

Reasons for Granting the Writ

Two issues of recurring importance in the administration of the deportation laws are posed by the decision of the Court below. The first is the construction which is to be given to the term *country* in Section 243(a) of the Immigration and Nationality Act, 66 Stat. 212, 8 U.S.C. 1253(a). Related to this issue, is whether the determination that the island of Formosa is a country within the meaning of the statute is a political decision which is foreclosed to the judiciary. The second issue is whether an alien may be arrested and deported under the authority of a warrant of deportation which fails to specify the place of his deportation.

1. Section 243(a) of the Immigration and Nationality Act [8 U.S.C. 1253(a)] enumerates nine alternative places of deportation. In each instance the place of deportation is expressly stated to be a country. Prior legislation permitted deportation to the port of embarkation. 8 U.S.C. 156.

When the United States is at war, Section 243(b) of the Immigration and Nationality Act authorizes deportation, in addition, to the country "in which is located" the alien's government in exile, or if not in exile, "to a country or

any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject." 8 U.S.C. 1253(b).

We are here concerned with the important question of the definition of "country" as used in Section 243(a), an issue not previously decided by this Court and one involved in every order of deportation.[2] Immediately affected are several hundred aliens.[3]

Heretofore under our immigration statutes the term country referred to a foreign "state" in the international sense. *U.S. ex rel. Mensevich* v. *Tod*, 264 U.S. 134, 136 (1924).[4] Contrary to the *Mensevich* case, and contrary to *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, the Court of Appeals determined that Formosa is a country because "there is a government on Formosa which has undisputed control of the island." Thus, for the first time, deportation is permitted not to an international state, but to an island

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[2] The Immigration Service deported 7,988 aliens in 1959. Annual Report of the Attorney General of the United States (1959), p. 385.

[3] The question here has been raised also in *Chao-Ling Wang* v. *Pilliod*, No. 58-C1427, United States District Court for the Northern District of Illinois; *Hsuan Wei* v. *Pilliod*, No. 58-C-1871, United States District Court for the Northern District of Illinois; *Chan Chuen* v. *Esperdy*, No. 153-159, United States District Court for the Southern District of New York; and *Tam Luen Kwong* v. *Hoy*, 710 BH59, C.A. 710-59, United States District Court for the Southern District of Calilfornia.

Eleven actions affecting nineteen aliens are pending in the District of Columbia. *Tang Sing King, aka David Dong* v. *Rogers*, C.A. 2855-59; *San Han Ning* v. *Rogers*, C.A. 2293-60; *Lin Tiee Chen* v. *Rogers*, C.A. 2069-60; *Liao Ding Ying* v. *Rogers*, C.A. 2223-59; *Bing Chen Huang, Wong King Tsai, Mah Ah Tong* v. *Rogers*, C.A. 2697-59; *David Chi-Jen Tsou and Cynthia Yun Soong Tsou* v. *Rogers*, C.A. 2375-60; *Peter Ying and Wong Chai Liang* v. *Rogers*, Court of Appeals No. 15,696; *Tam Luen Kwong, Cheng Sze Fook and Lee Soon Him* v. *Rogers*, C.A. 709-60; *Sik Wai Tong and Pin Young Leung* v. *Rogers*, C.A. 3321-59; *Wong Fui Shun* v. *Rogers*, C.A. 3615-59; and *Hom Ho and Hom Yim* v. *Rogers*, C.A. 1416-60.

[4] "The term 'country' is used in § 20 to designate in general terms the *state* which at the time of deportation includes the place from which the alien came." *U. S. ex rel. Mensevich* v. *Tod*, *supra*.

or possession, not to a country with sovereignty but to a territory over which a government has merely *de facto* control. The importance of this question was recognized by this court in *U.S. ex rel. Mensevich* v. *Tod*, 264 U.S. 134, 137 (1924).

Referring to *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1, the Court of Appeals noted that the word country is ambiguous, and that it may have the "sense of territory" and "embrace all the territory subject to a foreign sovereign power," or that it may mean a foreign government and "describe a foreign state in the international sense" or "it may mean a foreign government which has authority over a particular area or subject matter, although not an international person (but only a component part, or a political subdivision of the large international unit)."[5] (Appendix 23)

In ruling that Formosa is a country, the Court of Appeals relied solely upon a determination that it is an entity with a government in undisputed control. This approach follows neither the guidelines suggested by *Burnet* v. *Chicago Portrait Co.*, *supra*, nor, more essential, the requirements of the statute.

Clearly, Formosa does not meet the *territorial* or the *governmental* concepts of a country set forth in this Court's opinion in the *Chicago Portrait Co.* case. Formosa is not all (or, in view of the absence of sovereign control, any) territory subject to a foreign sovereign power. See *Morris, Dicey's Conflict of Laws* (7th Ed. 1958) at p. 13. Nor is it a foreign state in the international sense, or the component part, or political subdivision of the large international unit recognized by the United States.

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[5] The phrase included in parenthesis appears in *Burnet* v. *Chicago Portrait Co.*, *supra*, but was omitted from the Court of Appeals quotation from that opinion.

In seeking to avoid a rule that the word *country*, as used in Section 243(a), is limited to national sovereignties, the Court of Appeals ignored the statutory requirement that the "country of which the alien is a subject(,) national, or citizen • • • (be) • • • willing to accept him into its territory." See *Rogers* v. *Lu*, 262 F. 2d 471 (D.C. Cir.), and *United States ex rel. Tom Man* v. *Murff*, 264 F. 2d 926 (2nd Cir.).

The critical question which the statute requires to be answered is whether Formosa is the territory of the Republic of China. It is not met by a finding that there is an anonymous "government on Formosa" which has undisputed control over the island. By reason of the importance of the issue presented to the administration of our deportation laws herein and the conflict with decisions of this Court, we submit that certiorari is appropriate.

2. Reviewing the status of Formosa, the District Court, relying upon the official expressions of the Department of State, found that Formosa is "an area occupied and administered by the Government of the Republic of China but is not officially recognized as being a part of the Republic of China." 177 F. Supp. 281, 284. The District Court went on to state:

> "• • • The Court must be bound by the official attitude of the Department of State, which apparently has been studied very carefully and expressed in guarded phraseology. It is even conceivable that for the Court then to regard Formosa as part of China for any purpose and thus go beyond the expressions of the Department of State, might cause embarrassment or complication as far as that Department is concerned." At 284.

The Court of Appeals asserted that its construction of the term country does not permit the "possibilities of for-

eign affairs embarrassment" to arise, nor does it involve intervention into political matters. Yet, its criteria for determining whether Formosa is a country are that it is a well-defined "political entity" and that "there is a government on Formosa which has undisputed control over the island." (Appendix 23)

It seems self-evident that each of these hallmarks, as well as its very determination that Formosa is a country, raise political questions which bear upon the conduct of foreign relations. Indeed, as this Court has said repeatedly from *Fong Yue Ting*, 149 U.S. 698, to *Harrisiades* v. *Shaughnessy*, 342 U.S. 580, 588, 589, that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations."

With the question at issue being whether Formosa is the territory of the Republic of China, it seems inescapable that the courts are bound by the determination of the Department of State that Formosa has not been ceded, or its sovereignty transferred to China. 39 Department of State Bulletin No. 1017, pp. 1005, 1009. If the judiciary were permitted to decide that the occupation and administration of an area by a government makes that area the territory of that government, notwithstanding an express avoidance of the decision by the Executive, then the courts would be exercising a function of foreign policy "which has long been held not subject to judicial intrusion or inquiry." *Chicago and Southern Airlines* v. *Waterman Steamship Co.*, 333 U.S. 103, 111; *Jones* v. *United States*, *supra*.

This doctrine becomes especially applicable to the enforcement of warrants of deportation. For it is precisely at the point in time and place that a warrant of deportation is executed that the United States Government is engaged in negotiation with a foreign country. The negotiation begins when, pursuant to the Operations Instructions of the Im-

migration and Naturalization Service (at p. 3082), "field officers" are authorized to apply for travel documents, including passports, for deportable aliens "directly to the issuing foreign Consulate." It ends when officers of the Immigration and Naturalization Service tender deported aliens to the appropriate officials in the foreign country.

The deportation of a citizen of China to the custody of the Government of the Republic of China on the island of Formosa necessarily involves an exercise in the conduct of foreign relations, the significance of which may be far greater than the mere deportation of an alien. For the operative section of the statute applicable here (see Stipulation at R. 9) requires the deportation of the petitioners to the country of their nationality "if such country is willing to accept (them) into its territory" [see fourth sentence in Section 243(a), 8 U.S.C. 1253(a)].

In such a context, deportation of Chinese nationals to Formosa upon travel documents issued by the government of the Republic of China might well be regarded as a recognition that Formosa is China's territory. This is a political determination made here by "field officers" of the Immigration and Naturalization Service and sustained by the Court of Appeals, which the highest Executive in the United States has so far deliberately eschewed. See 39 Department of State Bulletin No. 1017, pp. 1005, 1009.

If the judiciary is empowered to determine in these circumstances, as did the Court of Appeals below, that an alien may be deported to a "well-defined geographical, social and political entity" if the alien's government has "undisputed control" over it, it seems scarcely necessary to suggest that the door has been opened to judicial intrusion into political matters with no little possibility of embarrassment in foreign affairs.

A mere listing of the areas in which there have been

recent changes in political and territorial control, unrecognized by the United States, indicates the impact which the decision below could have upon the conduct of foreign relations by the Executive.

Apart from China, there have been territorial changes and de facto administration in areas affecting Austria, Bulgaria, Czechoslovakia, the Free City of Danzig, Estonia, Finland, Germany, Hungary, India, Jerusalem, Jordan, Latvia, Lithuania, Pakistan, Palestine, Poland, Rumania, and the Union of Soviet Socialist Republics. None of the changes in control of the territories in question has resulted in a change of sovereignty recognized by the United States. See Visa Office Bulletin No. 39, February 9, 1959, Department of State, and attached map.[6]

The Court below may well have been beguiled by what would appear to be the acceptable political consequences of its decision. When its rule is applied to other less palatable circumstances, however, the dangers of the Court's construction are manifest. Surely, a determination analagous to the one made here, that a Polish citizen may be deported to what was the Free City of Danzig, occupied and administered by the Polish government—or a determination that a Chinese citizen may may be deported to Tibet, occupied and administered by the Peoples Republic of China, would be an encroachment upon the powers of the Executive in its conduct of foreign affairs and would indeed embarrass our present international policy.

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[6] The Bulletin and map summarize the existing boundaries for the purpose of quota allocations and are generally based upon "de jure recognition of sovereignty over a quota area by another country." However, 8 U. S. C. 1152(d) expressly provides that provision of an immigration quota for a quota area shall not constitute recognition by the United States of the political transfer of territory from one country to another. Accordingly, the quota area for China includes Manchuria, Inner Mongolia, Outer Mongolia, Sinkiang, Tibet, and Taiwan (Formosa). See Immigration Quota Area Map, *supra*.

Moreover, this determination with its attendant political consequences, as we have observed, is made in the very arena of foreign relations. Compare *Williams* v. *Suffolk Insurance Co.*, 13 Pet. 415, 420; *Jones* v. *United States*, 137 U.S. 202, 213; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302.

Especially because of the delicate effect which the execution of a deportation warrant may have upon the conduct of foreign affairs by the Executive is there need for an ultimate determination of the meaning to be attributed to the term *country*.

3. The decision below is in conflict with *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10, and disregards the change in statutory language in the provisions now governing places of deportation.

This Court has previously held that in construing the statutory language in a deportation law the "narrowest of several possible meanings" should be applied. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. See also *Delgadillo* v. *Carmichael*, 332 U.S. 388, and *Jordan* v. *DeGeorge*, 341 U.S. 223.

Yet the Court of Appeals attributed the broader of several possible meanings to the term *country* in order to comport with what it conceived to be the "evident (Congressional) purpose to reduce the number of 'undeportables' by increasing the number of places to which an alien under a final order of deportation may be sent." (Appendix 23) See also *Ying* v. *Rogers*, 180 F. Supp. 618 (D.C.).

Even the broad reading of the Congressional purpose is open to doubt. For in the amendatory legislation of 1950, 64 Stat. 1010, which is the immediate forerunner of the Immigration and Nationality Act and the source of the present language, Congress for the first time gave to aliens the right to designate the country to which they wished to

be deported. While the Attorney General was given discretion "without priority of preference" in the Internal Security Act amendments, *supra*, to deport the alien to any of a number of countries, the 1952 Act circumscribed the Attorney General's discretion by requiring that he give second priority to the country of the alien's nationality.

Although there may have been an overriding purpose to enlarge the *number of countries* to which a deportable alien may be deported, it reads too much into the Congressional purpose to suggest that the statute is intended to achieve deportation of an alien to an entity other than a country or that there is a purpose to override traditional patterns of international relations. Query: Could the term *country* be construed to sustain deportation of an alien to Devil's Island, which none can doubt, is a well-defined geographical, social and political entity with a government in undisputed control? Or to an uninhabited atoll in the Pacific Ocean? Or, to a city such as Cherbourg, with which the United States has no point of contact and which is under the jurisdiction of the French government with which we exchange ambassadors?

The Immigration Act of 1917, 39 Stat. 890, 8 U.S.C. 156, prior to its amendment by the Internal Security Act of 1950, 64 Stat. 1010, permitted aliens to be deported to the "country whence they came *or the foreign port* at which such aliens embarked for the United States." Notwithstanding the express change in the language in the statute, which now requires deportation to "the *country* in which is located the foreign port at which such alien embarked for the United States * * *." 66 Stat. 214, 8 U.S.C. 1253(a)(2), the Court of Appeals stated that there was not significance to the modification.

That there is a reason for the change in statutory language appears from the mechanism of executing warrants

of deportation. The issuance of passports and travel documents and the expression of willingness by a foreign government to accept a deportee—the conduct of foreign relations—are not the function of "foreign ports" or of cities, or indeed of any political subdivisions of governments. They are obviously the function of the governmental body which has status in the international community as a foreign state. Any exchange between the government of the United States and foreign governments regarding deportable aliens necessarily are between the national governmental agencies. Nor is it the function of the deporting country to specify the area in the receiving country to which the alien should be deported. Reasons which are both cogent and of substance are, therefore, available to explain the limitation upon the power to deport aliens to specified cities, islands or possessions.

Especially where Congress has made changes in the statute it is inappropriate to gloss over the modifications as without significance. As the District Court observed, to rule that petitioners may be deported to their port of embarkation on Formosa is "peculiarly an encroachment on the legislative power because it would reinsert back into the statute a phrase "foreign port" which Congress deliberately dropped. 177 F. Supp. at 285.

Petitioners' position is underscored by an examination of the variety of terms which Congress has chosen in the Immigration and Nationality Act to denominate geographical and political areas. What is especially significant is that the very section which contains the statutory language at issue here permits deportation when the United States is at war to a "political or territorial subdivision" of a country. Section 243(b), 8 U.S.C. 1253(b). Elsewhere the statute employs a veritable storehouse of other words and phrases: "port of deportation" [8 U.S.C. 1253(c)]; "for-

eign port or place" [8 U.S.C. 1101 (a)(13)]; "initial point of departure" (8 U.S.C. 1323); "any place outside of the United States," 8 U.S.C. 1281(a), 1284(a) and (b), 1287, 1323(a) and 1326(a)(2).

The use of specific words by Congress to say what it means precludes the usage of the term *country* to supply a meaning available from other statutory words. *United States* v. *Atchison T. & S.F.R. Co.*, 220 U.S. 37.

4. Equally important to the issue is whether Formosa may be regarded as a country for purposes of deportation, is the question whether an alien may be deported at all under the authority of a warrant which fails to specify the place of deportation. The relevant language in the statute provides that "deportation of such alien shall be directed to any country * * *" 8 U.S.C. 1253(a). The statute is implemented by regulations at 8 C.F.R. 243.1 which require as to "Issuance of warrants of deportation" that "a warrant of deportation shall be based upon a final order of deportation and shall be issued by a district director * * *."

The regulations provide further at 8 C.F.R. 243.1(b) that:

> "District directors shall exercise the authority contained in Section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense, an alien in the United States shall be deported."

At 8 C.F.R. 243.3 they provide as to "Execution of Warrants of Deportation (a) Taking alien into custody. Upon the issuance of a warrant of deportation * * * the alien * * * shall be taken into custody under the authority of such warant of deportation and deported."

The failure of the Attorney General to comply with his own regulations by omitting to designate the country of deportation voids the warrants of deportation issued against

the petitioners. *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260. See also *Lewis* v. *Frick*, 233 U.S. 291, 304, 305; *Wegelinsky* v. *Zurbick*, 282 U.S. 798; *Saksagansky* v. *Weedin*, 53 F. 2d 13 (C.A. 9); Cf. *Ying et al.* v. *Rogers*, 180 F. Supp. 618 (D.C.).

Although the Immigration and Naturalization Service notified the petitioners that they were to be deported to Formosa, a question remains whether such notification can remedy a defect in the warrant. It is the warrant of deportation which vests in the arresting officer of the Immigration and Naturalization Service his authority to take the petitioners into custody and to deport them. A warrant which authorizes deportation "pursuant to law" is uncertain. It fails to give either specific directions for the protection of the person to be deported or for the information of the deportation officers. *Ex Parte Vahucanin*, 199 Fed. 367, 368 (D. Mont.), and *Ex Parte Callow*, 240 Fed. 212 (D. Colo.).

Whether such a practice is permissible under the statute, under the regulations, and, indeed, under the due process clause of the Fifth Amendment of the Constitution, is a question of fundamental importance in the administration of the Immigration and Nationality Act, and of concern both to the Immigration and Naturalization Service and to the deportable alien.

Conclusion

The questions presented here as to the construction to be given to the term country in the deportation provisions of the statute and as to the validity of a warrant of deportation which fails to specify the country to which an alien is to be deported are each of manifest and continuing importance in the enforcement and administration of our immigration laws.

The decision below is in conflict with decisions of this Court and contrary to the express statutory modifications made by Congress in the provisions of law regulating deportation.

For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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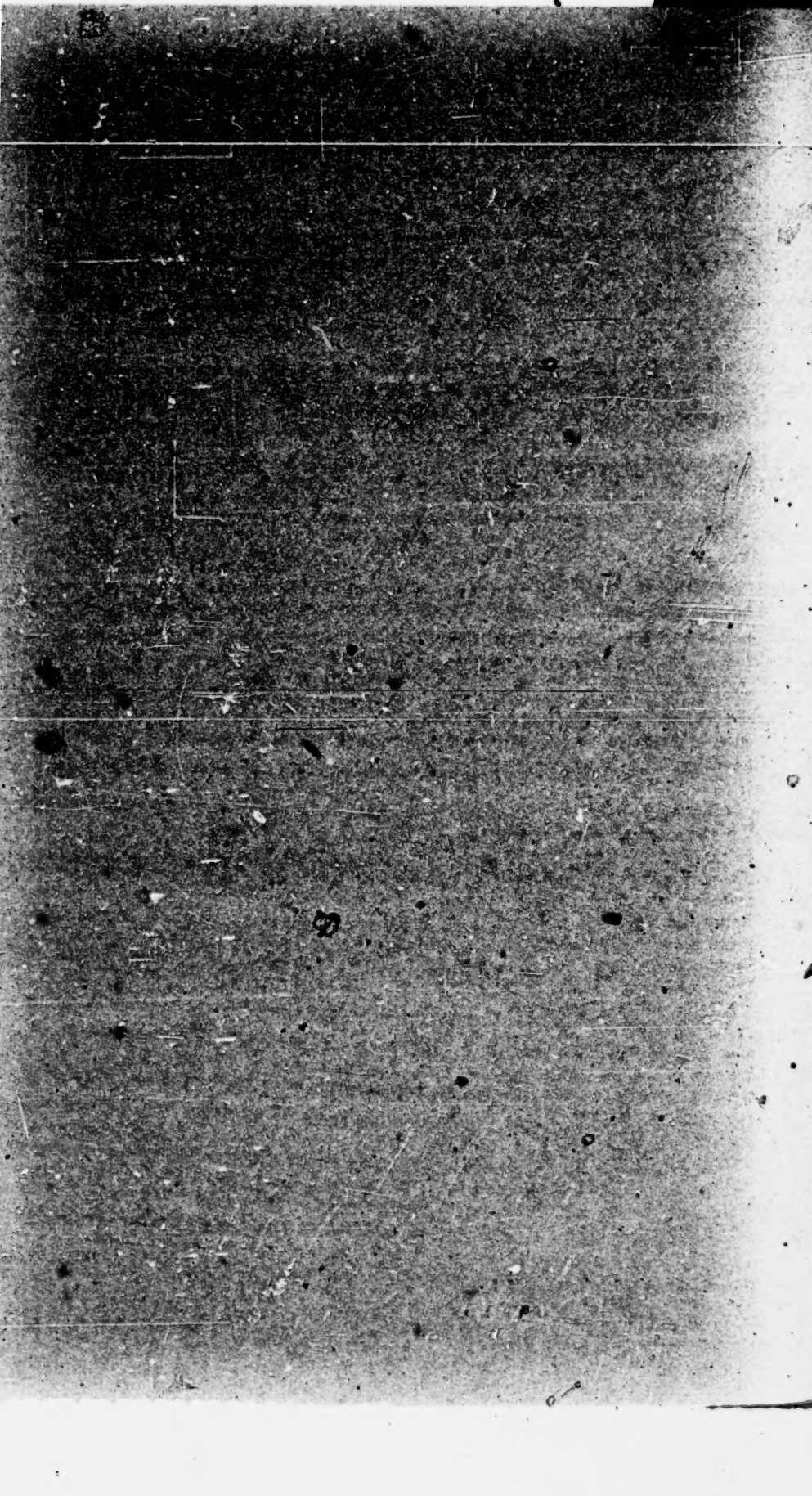
APPENDIX



UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15487

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

CHENG FU SHENG AND LIN FU MEI, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided June 10, 1960

Before MR. JUSTICE REED, retired,* and BAZELON and WASHINGTON, *Circuit Judges.*

BAZELON, *Circuit Judge:* The Attorney General appeals from the District Court's entry of summary judgment, on cross-motions, enjoining the deportation of the alien appellees[1] to Formosa on the ground that "the place to which deportation may be ordered [under the Immigration and Nationality Act] is a *country* and not a particular location" and Formosa is neither a country itself nor part of any country, its status being in limbo.[2]

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* Sitting by designation pursuant to § 294(a), Title 28, U.S. Code.

[1] The circumstances giving rise to the deportation order are set forth in the District Court's opinion, 177 F. Supp. 281 (D.D.C. 1959) and in *Cheng Fu Sheng* v. *Barber*, 269 F.2d 497 (9th Cir. 1959), where appellees obtained the right to seek congressional relief under § 6 of the Refugee Relief Act. 67 Stat. 403 (1953), 50 U.S.C. App. § 1971(d) (1958). Congress subsequently refused to grant them permanent residence. 105 CONG. REC. 17586 (daily ed. Sept. 11, 1959); H.R. REP. 1176, 86th Cong., 1st Sess. (1959).

[2] China ceded Formosa to Japan in 1895. Following World War II, Japan surrendered all claims of sovereignty over Formosa. But in the view of our State Department, no agreement has "purported to transfer the sovereignty of Formosa to [the Republic of] China." At the present time, we accept the exercise of Chinese authority over Formosa, and recognize the Government of the Republic of China (the Nationalist Government) as the legal Government of China. That Government has its provisional capital at Taipei, Taiwan (Formosa). See documents reprinted in the District Court's opinion, 177 F. Supp. 281 (D.D.C. 1959).

Section 243(a) of the Immigration and Nationality Act of 1952 provides some nine places to which aliens may be deported.[3] In each case, with one possible exception not here relevant,[4] the place is described as a "country."

Although the term "country" is used in this and other sections of the Act, Congress has supplied no definition. It must therefore be given its ordinary meaning, consistent with the purposes of the legislation. *Delaney* v. *Moraitis*, 136 F.2d 129 (4th Cir. 1943); *Burnet* v. *Chicago Portrait Co.*, 285 U.S. 1 (1932); cf. *United States, ex rel. Mensevich* v. *Tod*, 264 U.S. 134 (1924).

The Supreme Court has pointed out that "the word 'country' . . . is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense

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[3] 66 Stat. 214 (1952), 8 U.S.C. § 1253(a) (1958).

The statute provides that a deportable alien may, with certain limitations, be deported to a country of his choice; to the country of which he is "a subject, national or citizen"; or in the discretion of the Attorney General to any of the following: (1) the country from which the alien last entered the United States; (2) the country in which is located the foreign port at which he embarked for the United States; (3) the country in which he was born; (4) the country in which his place of birth is situated when deportation is ordered; (5) any country in which he resided prior to entering the country from which he entered the United States; (6) the country which had sovereignty over his birthplace at the time of his birth; or (7) any country which is willing to accept him into its territory.

[4] According to subsection (7), "if deportation to any of the foregoing *places* or countries is impracticable, inadvisable or impossible . . ." (emphasis supplied) then the alien may be deported "to any country willing to accept [him]." Appellees contend that the word "places" in this subsection was not intended to be synonymous with "countries" and thus does not broaden the meaning of "countries." Rather they contend, "places" was used to refer to "foreign territory contiguous to the United States or any island adjacent thereto." This phrase is used in § 243 to describe "places" which an alien may not designate as the preferred site of deportation. We note, without deciding whether "places" and "countries" were intended to be used as equivalents, that appellees' argument does not stand scrutiny. The portion of § 243(a) to which they refer would seem to equate "country" and "place." It states that deportation shall be to "a *country* promptly designated by the alien" but "no alien shall designate as the *place* to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto." (Emphasis supplied.) See also *United States ex rel. Moon* v. *Shaughnessy*, 218 F.2d 316, 319 (2d Cir. 1954).

of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense . . . or it may mean a foreign government which has authority over a particular area or subject matter, although not an international person. . . ." *Burnet* v. *Chicago Portrait Co.*, *supra*.

Since Formosa is a well-defined geographical, social and political entity and since there is a government on Formosa which has undisputed control of the island, we think it is a "country" within the meaning and purposes of the statute. This construction comports with Congress' evident purpose to reduce the number of "undeportables" by increasing the number of places to which an alien under a final order of deportation may be sent.[5] To hold otherwise would open to doubt the Attorney General's power to deport aliens to areas of the world where diplomatic status is unsettled, such as various trusteeships, protectorates or colonies.

We attribute no significance to the fact that the 1917 predecessor to § 243(a) permitted aliens to be deported to the "country whence they came" or the foreign port at which such aliens embarked for the United States."[6] Under this provision, appellees would be deportable to their point of embarkation on Formosa. The corresponding section now reads "the country in which is located the foreign port at which such alien embarked for the United States . . ." § 1253(a)(2). Congress gave no

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[5] See S. Rep. No. 1515, 81st Cong., 2d Sess. 637-38 (1950).

There were, in 1950, some 3,600 non-enforceable deportation orders because the countries concerned (especially Iron Curtain countries) refused to issue travel documents. One proposed bill sought to remedy the situation thus:

> "Country of deportation: While under existing law a deportable alien can be deported only to the country from which he departed or the country of his citizenship or last foreign residence, this bill would authorize the Attorney General, within discretion, to deport an alien to any country which will agree to accept him into that territory." S. Rep. No. 1515, *supra*.

This proposal was incorporated into the present legislation.

[6] 39 Stat. 890 (1917).

reason for the change, and we are unable to find that it was intended to be one of substance running counter to the Congressional purpose of tightening the deportation laws.

Since we conclude that the word "country" as used in § 243(a) is not limited to national sovereignties in the traditional diplomatic sense, see *United States ex rel. Moon* v. *Shaughnessy*, 218 F.2d 316 (1954), the possibilities of foreign affairs embarrassment which the District Court feared do not arise. Nor does this construction involve judicial intervention into political matters entrusted to the Executive and Legislative Branches. The judgment is accordingly reversed and the case is remanded to the District Court with directions to grant summary judgment for the appellant.

So Ordered.

Filed June 10, 1960. Joseph D. Stewart, Clerk

Civil 2580-59

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 15,487 September Term, 1959

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, APPELLANT,

v.

CHENG FU SHENG AND LIN FU MEI, APPELLEES.

Appeal from the United States District Court for the District of Columbia

Before: MR. JUSTICE REED, retired, and BAZELON and WASHINGTON, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, reversed, and that this cause be, and is hereby remanded to the said District Court with directions to grant summary judgment for the defendant.

Per Circuit Judge Bazelon.

Dated: June 10, 1960.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2580-59

CHENG FU SHENG AND LIN FU MEI, PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

OPINION

The principal question presented for decision in this case is whether an alien who is deportable to China may be deported to Formosa. This is an action against the Attorney General for a declaratory judgment, which would adjudicate that the plaintiffs, who are natives and citizens of China and whose deportation has been ordered, may not be deported to Formosa. The matter comes before this Court on cross-motions for summary judgment. There are no material issues of fact and only questions of law are involed.

The plaintiffs are natives and citizens of China, who entered the United States in 1952 to receive military training with the United States Air Force. They completed their studies but failed to depart from this country. Deportation proceedings were thereupon brought against them by the Immigration and Naturalization Service of the Department of Justice, and eventuated in warrants directing the deportation of the plaintiffs "pursuant to law." It has been stipulated that the Government intends to execute the warrants by deporting them to Formosa, in view of the fact that deportation to the mainland of China is impossible due to its occupation by the Communist regime. The plaintiffs thereupon instituted this action against the Attorney General for a declaratory judgment adjudicating that their deportation to Formosa would be contrary to law.

The places to which an alien may be deported are expressly and specifically defined by statute. The provisions now in effect are contained in the Act of June 27, 1952, and

are found in Section 1253 of Title 8 of the U.S. Code. This enactment enumerates eight possibilities as places of deportation. Each possibility, however, is expressly stated to be a *country*. Among them is the country from which the alien last entered the United States; the country in which is located the foreign port at which he embarked for the United States; the country in which he was born; the country in which his place of birth is situated when deportation is ordered; any country in which he resided prior to entering the country from which he entered the United States; or the country which had sovereignty over his birthplace at the time of his birth. It should be emphasized, however, that in each instance the place to which deportation may be ordered is a *country* and not a particular location. In this respect the 1952 statute is radically different from the earlier law, which permitted deportation to be had to a particular port, such as the foreign port at which the alien embarked for the United States. Thus, Section 20 of the Act of February 5, 1917,[1] expressly provided that the deportation of aliens "be to the country whence they came or to the *foreign port*[2] at which such aliens embarked for the United States; . . ." Were this provision in existence in the present statute, there would be no doubt whatever that the deportation of the plaintiffs to Formosa would be valid. For some reason which does not seem to appear in the legislative history, this provision was not included in the 1952 Act, and thereby was repealed by implication. No doubt the Congress must have had some good reason for abrogating the power of the Government to deport an alien to a specified port and requiring deportation only to a designated country.

Since the plaintiffs are natives and citizens of China, their deportation may properly be effected to China. The question then arises whether Formosa is part of China. If it is, they may lawfully be deported to Formosa.

It is fundamental that such questions as whether a foreign country or a foreign government should be formally recog-

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[1] 39 Stat. 874, 890.

[2] Italics supplied.

nized; whether a particular nation has sovereignty over a specified area; and what are the boundaries of a foreign country, are problems that are not to be solved by the Courts, but are political matters that are to be decided by the executive and legislative departments of the Government. On such topics the President and the Secretary of State speak for the United States, and the courts are obligated to follow their pronouncements.

Thus, in the leading case of *Jones* v. *United States*, 137 U.S. 202, 212, Mr. Justice Gray wrote as follows:

> "Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances."

The following authorities among the legion that might be cited are to the same effect:

Foster v. *Neilson*, 2 Pet. 253, 307, 309.
Williams v. *Suffolk Ins. Co.*, 13 Pet. 415, 420.
Oetjen v. *Central Leather Co.*, 246 U.S. 297, 302.
National Union Fire Ins. Co. v. *Republic of China*, 254 F. 2d 177.
Latvian State Cargo & Passenger SS Line v. *Clark*, 80 F. Supp. 683.
Oppenheim, International Law, 7th Ed. Sec. 357a.
I *Hackworth, Digest of International Law*, 165.

It is necessary, therefore, to ascertain and be guided by the attitude of the Department of State on the question whether Formosa is to be regarded as a part of China.

The attitude of the State Department is stated in a formal communication from Ely Maurer, Assistant Legal Adviser for Far Eastern Affairs of the Department of State, dated June 2, 1959, and addressed to Mr. Robert J. Asman, an Assistant United States Attorney. This statement was submitted by Government counsel as representing the views

of the political department of the Government on this subject. Pertinent portions of this statement read as follows:

> "In response to your telephone inquiry of this date, you are informed that the United States recognizes the Government of the Republic of China as the legal Government of China. The provisional capital of the Republic of China. The provisional capital of the mosa), since December 1949.
>
> "In 1895, under terms of the Treaty of Shimonoseki, China was compelled to cede Formosa to Japan. In the Cairo Conference, the United States, United Kingdom and China declared it was their 'purpose' that Manchuria, Formosa and Pescadores 'shall be restored to the Republic of China." Thereafter in August 1945 in the Potsdam Conference of the United States, United Kingdom and China declared 'that the terms of the Cairo Declaration shall be carried out.' This Potsdam Declaration was subbsequently adhered to by the U.S.S.R. (On September 2, 1945 the Japanese Government, in the instrument of surrender, accepted the provisions of the Declaration. The Supreme Allied Commander for the Allied Powers then issued Directive No. 1 under which the Japanese Imperial Headquarters issued General Order No. 1 requiring Japanese commanders in Formosa to surrender to Generalissimo Chiang Kai-shek of the Republic of China. Since September 1945 the United States and the other Allied Powers have accepted the exercise of Chinese authority over the island. In Article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all 'right, title and claim' to Formosa."

A Department of State Bulletin, Vol. XXXIX, No. 1017, dated December 22, 1958, which constitutes an official expression of the foreign policy of the United States, contains the following discussion of the problem in which we are interested (pp. 1005 and 1009):

> "Since the middle of the 17th century and up to 1895 Formosa was a part of the Chinese Empire. In 1895 under the Treaty of Shimonoseki China ceded Formosa

to Japan. In the Cairo conference in November 1943 the United States, United Kingdom, and China declared it was their 'purpose' that Manchuria, Formosa, and the Pescadores 'shall be restored to the Republic of China.' Thereafter in August 1945 in the Potsdam conference the United States, United Kingdom, and China declared that 'the terms of the Cairo Declaration shall be carried out.' This Potsdam declaration was subsequently adhered to by the U.S.S.R. On September 2, 1945, the Japanese Government, in the instrument of surrender, accepted the provisions of the declaration. The Supreme Allied Commander for the Allied Powers then issued Directive No. 1 under which the Japanese Imperial Headquarters issued General Order No. 1 requiring Japanese commanders in Formosa to surrender to Generalissimo Chiang Kai-shek of the Republic of China. Since September 1945 the United States and the other Allied Powers have accepted the exercise of Chinese authority over the island. In article 2 of the Japanese Peace Treaty, which entered into force April 28, 1952, Japan renounced all 'right, title and claim' to Formosa. *Neither this agreement nor any other agreement thereafter has purported to transfer the sovereignty of Formosa to China.*" (Emphasis supplied.)

* * * * *

"In giving the historical background of Formosa it has been pointed out that at Cairo the Allies stated it was their purpose to restore Formosa to Chinese sovereignty and at the end of the war the Republic of China received the surrender of Japanese forces on Formosa. It has also been pointed out that under the Japanese Peace Treaty, Japan renounced all right, title, and claim to Formosa. However, *neither in that treaty nor in any other treaty has there been any definitive cession to China of Formosa. The situation is, then, one where the Allied Powers still have to come to some agreement or treaty with respect to the status of Formosa.*" (Emphasis supplied.)

From the foregoing official pronouncements of the Department of State, it appears that the United States recognizes the Government of the Republic of China as the legal government of China; that the provisional capital of the Republic of China has been at Taipei, Taiwan (Formosa) since December 1949; that the Government of the Republic of China exercises authority over the island; that the sovereignty of Formosa has not been transferred to China; and that Formosa is not a part of China as a country, at least not as yet, and not until and unless appropriate treaties are hereafter entered into. Formosa may be said to be a territory or an area occupied and administered by the Government of the Republic of China, but is not officially recognized as being a part of the Republic of China. Expressions of the State Department are drawn with care and circumspection to refrain from such recognition.

Whether such a territory may be regarded as a part of a country as that term is used in the Immigration laws, does not appear to have been decided. The existence of the question was noted by Mr. Justice Brandeis in *United States ex rel Mensevich* v. *Tod*, 264 U.S. 134, 137, but expressly left open.

The conclusion seems inescapable to this Court that since under existing law, deportation may be effected only to a specific country, in this instance China, and since Formosa is not regarded by the Department of State as part of China as a country, the plaintiffs may not be deported to Formosa. Manifestly, as has been shown heretofore in this matter the Court must be bound by the official attitude of the Department of State, which apparently has been studied very carefully and expressed in guarded phraseology. It is even inconceivable that for the Court then to regard Formosa as part of China for any purpose and thus go beyond the expressions of the Department of State, might cause embarrassment or complications insofar as that Department is concerned.

It is urged by Government counsel that the word "country" should be given a broad meaning. Manifestly, a statute would not be construed literally, but should receive a reasonable and sensible interpretation. On the other hand,

the Courts should resist any temptation to read into a statute something that is not there, or place a tortured construction on an enactment with a view to effectuating what the Court may think the Congress would have done had the matter been called to its attention. To do so would be an encroachment on the legislative power. It is peculiarly so in this instance because in the 1952 revision, the Congress dropped the provision contained in the 1917 Act, which permitted deportation to a specific foreign port. It would seem that to adopt the construction urged by the Government would in effect reinsert that phrase back in the statute—something that the Congress has not done so far and that the Court may not do.

The decision of the Fourth Circuit in *Delany* v. *Moraitis*, 136 F. 2d 129, on which Government counsel, in part, rely, does not seem to help their position. That case held that a citizen of Greece, whose deportation had been ordered but who could not be deported to Greece because Greece had been overrun by Germany during the War, could be delivered into the custody of the Greek Government in exile in England. It must be observed that Judge Parker in his opinion based his decision very largely on war conditions then prevailing. The Congress later, in the 1952 revision, expressly limited the effect of the decision in the *Delany* case to deportation in time of war, 8 U.S.C. § 1253(b)(1). Consequently, the conclusion of the *Delany* case must be regarded as law only in time of war.

The Court is not unmindful of the fact that its conclusion leads to a temporary impasse and makes it impossible for the time being to effect the deportation of the plaintiffs, and possibly other citizens of China. This matter can, however, be easily solved, for the Congress can readily and promptly amend the statute and make the amendment retroactive, if it feels that deportation should be effected. This course need not involve undue delay. The Congress could possibly amend the statute by reinserting into the above-mentioned provision from the 1917 Act, or by providing that deportation may be effected to any territory or area provisionally occupied by the Government of the country to which deportation must be effected, or in some other manner that

would accomplish the same objective. Legislative action would be the orderly course. For the Court to construe the present Act as meaning something that it does not purport to mean, would be an invasion of legislative power.

Motion of defendant for summary judgment is denied.

Motion of plaintiffs for summary judgment is granted.

[S] ALEXANDER HOLTZOFF,
United States District Judge.

OCTOBER 6, 1959.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2580-59

CHENG FU SHENG, ET AL., PLAINTIFFS

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT

ORDER

This case having come before the Court on cross motions for summary judgment, an it appearing that there are no material issues of fact involved herein and that plaintiffs are entitled to judgment as a matter of law, it is by the Court, this 13th day of October, 1959.

Ordered, That plaintiffs' motion for summary judgment be and it hereby is granted; and it is

Further Ordered, That defendant's motion for summary judgment be and it hereby is denied.

[S] Holtzoff, J.,
Judge.

(1793-9)